1988

The State of Utah v. Andrew R. Quintana : Petition for Rehearing

Utah Court of Appeals

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Lynn R. Brown; Richard G. Uday; Salt Lake Legal Defender Assoc.; Attorneys for Appellant.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff/Respondent,	:	
v.	:	
ANDREW R. QUINTANA, Appellant/Petitioner.	:	Case No. 880406-CA Priority No. 2

PETITION FOR REHEARING

Petition for Rehearing of an appeal from judgment and conviction for Burglary, a second degree felony, in violation of Utah Code Ann. § 76-6-202 (1953 as amended), and Theft, a third degree felony, in violation of Utah Code Ann. § 76-6-404 (1953 as amended), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Raymond S. Uno, Judge, presiding.

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STATEMENT OF THE CASE

Petition for Rehearing of an appeal from judgment and conviction for Burglary, a second degree felony, in violation of Utah Code Ann. § 76-6-202 (1953 as amended), and Theft, a third degree felony, in violation of Utah Code Ann. § 76-6-404 (1953 as amended), following a jury trial held May 24-25, 1988, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Raymond S. Uno, Judge, presiding. Following briefing and oral argument, this Court issued its opinion in State v. Quintana on October 4, 1989, affirming the convictions. A copy of the Court's opinion is attached as Addendum A.

INTRODUCTION

This Petition for Rehearing is filed pursuant to Rule 35, Utah Rules of the Court of Appeals. In Brown v. Pickard, 11 P. 512 (Utah 1886), the Utah Supreme Court established the standard for granting a petition for rehearing, stating:

> To justify a rehearing, a strong case must be made. We must be convinced that the court failed to consider some material point in the case, or that it erred in its conclusions . . . .

Later, in Cummings v. Nielson, 129 P. 619, 624 (Utah 1913), the Supreme Court added:

> To make an application for a rehearing is a matter of right, and we have no desire to discourage the practice of filing petitions for rehearings in proper cases. When this court, however, has considered and decided all of the material questions involved in a case, a rehearing should not be applied for, unless we have misconstrued or overlooked some statute or decision which may affect the result, or that we have based the decision on some wrong principle of law, or have either misapplied or overlooked something which materially affects the result . . . If there are some reasons, however, such as we have indicated above, or other good reasons, a petition for a rehearing should be promptly filed and, if it is meritorious, its form will in no case be scrutinized by this court.

In accordance with the above-noted principles, this Petition for Rehearing is properly before the Court and should be granted. In the opinion authored in State v. Quintana, No. 880406-CA (filed October 4, 1989), this Court misapprehended and misconstrued the law as it pertains to this case.

SUMMARY OF THE ARGUMENT

The prosecutor's comments in his opening statement to the jury violating the court order denied Mr. Quintana his rights to a fair trial under both the state and federal constitutions. A rehearing is warranted in this case because this Court (1) failed to distinquish opening statement misconduct from closing argument misconduct, (2) failed to address the prosecutor's violation of the court's pretrial order to suppress the identification, and (3) failed to properly apply the correct legal standard to the facts of this case. When this Court properly makes the above distinctions

and analyses, reversal of Mr. Quintana's convictions is warranted.

ARGUMENT

POINT. THE PROSECUTOR'S COMMENTS IN HIS OPENING STATEMENT VIOLATING THE COURT ORDER DENIED MR. QUINTANA HIS RIGHTS TO A FAIR TRIAL UNDER THE STATE AND FEDERAL CONSTITUTIONS.

Prior to trial in this case, Mr. Quintana filed a motion to suppress the identification of him by one Calvin Dean Rains. The trial court granted that motion.

However, during the State's opening statement, the prosecutor, despite the court order forbidding Mr. Rains to identify Mr. Quintana as the burglar, informed jurors that Mr. Rains saw Mr. Quintana come out of the alley behind the burglarized home. Mr. Quintana immediately moved for a mistrial. That motion was denied by the trial court.

Mr. Quintana appealed to this Court claiming that the prosecutor's remarks denied him his right to a fair trial and required reversal of his convictions.

The State responded conceding that the prosecutor's remarks were contrary to the order of the court and were erroneous. Brief of Respondent at 12. The State urged, however, that the error was harmless and did not prejudice Mr. Quintana. Id.

This Court on review also found the prosecutor's opening statement comments to be highly improper and erroneous misconduct. Opinion at 6. Nonetheless, the Court found that the misconduct does not require reversal. Opinion at 6-7.

This Court's opinion is ill based. The Court has

misapprehended both the law and the facts, misapplied the law to the facts, and overlooked critical subtleties in the law which require rehearing and reversal of Mr. Quintana's convictions.

Specifically, Mr. Quintana suggests that this Court failed in three critical analyses of this case: (1) failed to distinquish opening statement misconduct from closing argument misconduct, (2) failed to properly address the prosecutor's violation of the court's pretrial order, and (3) failed to apply the correct legal standard to the facts of the case. Individually and collectively, these errors require reversal of Mr. Quintana's convictions.

A. THIS COURT FAILED TO DISTINGUISH OPENING STATEMENT MISCONDUCT FROM CLOSING ARGUMENT MISCONDUCT.

This Court relies on State v. Thomas, 111 Utah Adv. Rep. 24 (Utah 1989), and State v. Tillman, 750 P.2d 546 (Utah 1987), for its decision. Both cases, however, are not dispositive of the case at bar, although they do reiterate the two-part test for determining whether a prosecutor's misconduct requires reversal. Nonetheless, both State v. Thomas and State v. Tillman, like so many other cases in this jurisdiction (see, e.g., State v. Rislow, 736 P.2d 637 (Utah 1987); State v. Tucker, 727 P.2d 185 (Utah 1986); State v. Smith, 700 P.2d 1106 (Utah 1985); and State v. Valdez, 513 P.2d 422 (Utah 1973), involve closing argument misconduct/statements of prosecutors, not opening statement misconduct. Moreover, none of these cases involve the direct violation of court orders as occurring in the case at bar.

In his briefs to this Court, Mr. Quintana emphasized the distinction between opening and closing arguments. Mr. Quintana cited federal and state case law to support the violation of his right to a fair trial.[1] See Brief of Appellant at 9-16.

Mr. Quintana espoused the longstanding principle of jurisprudence that opening statements of prosecutors are confined to general recitals of what the State expects to prove, without, however, any reference to evidence which would not be admissible in trial. See Walker v. State, 624 P.2d 687 (Utah 1981); State v. Erwin, 120 P.2d 285 (Utah 1941); and State v. Distefano, 262 P. 113 (Utah 1927).

More specifically, Mr. Quintana identified competent support that a difference exists between prosecutorial misconduct in opening statements and those which occur in closing arguments. The Eighth Circuit's opinion in United States v. Johnson, 767 F.2d 1259, 1274 (8th Cir. 1985), reasons that prosecutorial misconduct "made during an opening statement makes it more egregious than a similar remark would be in a closing argument." The court further pointed out the distinction between the two is that improprieties during closing arguments can be excused as product of provocation while opening statements take place in a less volatile atmosphere and are

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[1] Because Mr. Quintana relied on both federal and state law which analytically rely on federal due process analysis--none of the cases note reliance on state due process--he believes the Court's footnote no. 2 at page 6 of the opinion is in error. However, Mr. Quintana also has urged that any harmless error analysis was improper. See subpoint B, infra. If, however, this Court disagrees, the federal standard should be evaluated as well.

presumed to be planned. Id.

Additionally, Mr. Quintana relied on State v. Troy, 688 P.2d 483 (Utah 1984). State v. Troy is a rare opinion among the many prosecutorial misconduct cases in this jurisdiction where opening statement comments were attacked as prejudicial misconduct. The Utah Supreme Court reversed the conviction in that case, particularly relying on the opening statement remarks.[2]

This Court in its opinion failed to address the alleged distinctions between opening statement and closing argument misconduct. Accordingly, rehearing is mandated so that this Court may correct its error, address the issue, and reverse Mr. Quintana's convictions.

B. THIS COURT FAILED TO ADEQUATELY ADDRESS THE PROSECUTOR'S VIOLATION OF THE TRIAL COURT'S ORDER.

Perhaps even more disquieting than the error noted above is that this Court failed to address the question of the prosecutor's behavior in defiance of the court's pretrial order to the contrary.

Applying a harmless error analysis to a prosecutor's direct violation of a court order is contrary to the ends of justice

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[2] Only one other case, State v. Lafferty, 749 P.2d 1239, 1253-55 (Utah 1988), discusses alleged opening statement misconduct. That case involved a discrepancy between the facts proven and the opening statement proffer. The Court termed the discrepancy as "so slight that it was not error." Id. at 1254. Notably, the Lafferty case is readily distinguishable in any event because it did not involve the violation of a trial court's suppression order as occurred in the case at bar.

in this individual case as well as all other future cases.[3] In State v. Ubaldi, 462 A.2d 1001 (Conn. 1983), cert. denied, 464 U.S. 916 (1983), the Connecticut Supreme Court explained its refusal to apply a harmless error analysis under similar circumstances:

> The ultimate implication of [the harmless error analysis] argument is that a state's attorney may choose deliberately to ignore any trial court ruling just as long as the state has amassed overwhelming evidence of a defendant's guilt and the state's attorney's misconduct relates only to a portion of that evidence. We decline to place such a restraint on the ability of this court to defend the integrity of the judicial system.

Id. at 1007.

The Ubaldi court recognized the remedies and rationales utilized in other jurisdictions on this issue and proffered the following:

> According to some authorities, the evil of overzealous prosecutors is more appropriately combatted through contempt sanctions, disciplinary boards or other means. This court, however, has long been of the view that it is ultimately responsible for the enforcement of court rules in prosecutorial misconduct cases. Upsetting a criminal conviction is a drastic step, but it is the only feasible deterrent to flagrant prosecutorial misconduct in defiance of a trial court ruling.

Id. at 1009. The Ubaldi court then offerred an explanation of why this Court's opinion in State v. Quintana is incorrect and why it

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[3] Mr. Quintana does not suggest by advancing this argument that the facts against him were overwhelming. Mr. Quintana continues to aver that the State's case against him was less than compelling and that the prosecutorial misconduct, when analyzed properly, demanded the mistrial motion be granted. See argument, subpoint C, infra.

ill serves justice. That court noted:

> We are mindful of the sage admonition that appellate rebuke without reversal ignores the reality of the adversary system of justice. 'The deprecatory words we use in our opinions . . . are purely ceremonial.' Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking. 'The practice [of verbal criticism without judicial action]--recalling the bitter tears shed by the walrus as he ate the oysters--breeds a deplorably cynical attitude towards the judiciary.' Moreover, '[d]eliberate prosecutorial misconduct is presumably infrequent; to invalidate convictions in the few cases where this is proved, even on a fairly low showing of materiality, will have a relatively small impact on the desired finality of judgments and will deter conduct undermining the integrity of the judicial system.'

Id. (citations omitted; brackets by the court).

Cases from the Utah Supreme Court support the view of the Connecticut Supreme Court. In State v. Wiswell, 639 P.2d 146 (Utah 1981), the prosecutor raised the appellant's failure to testify after the trial court repeatedly sustained objections to the admission of such evidence. After concluding that the prosecutor's conduct violated the appellant's right to remain silent, the Utah Supreme Court found reversible error, stating:

> The continued attempts by the prosecutor to put the defendant's silence before the jury after his having been advised of his right to remain silent amounts to prosecutorial misconduct.
>
> The references to defendant's silence are fundamental error, which could have affected the result and are therefore prejudicial.

Id. at 147.

In State v. Brown, 607 P.2d 261 (Utah 1980), a capital case, the trial court instructed an attorney witness that hearsay on hearsay evidence would not be permitted in the penalty phase because of its lack of probative value. Despite the trial court's ruling, the prosecutor and his attorney witness did not honor the ruling. Id. at 270. The Utah Supreme Court noted:

> We cannot say that the errors that occurred here were harmless. An inflammatory obscenity was inaccurately imputed to the defendant in the penalty phase, which arose from a violation of the District Court's order.

Id. at 271. Because the error worked prejudice to the defendant--was not harmless--the Court reversed the sentence of death. Id.

Other jurisdictions concur with the concept that violation of a court order to avoid prejudicing the case against the accused requires a reversal of the conviction. A Texas court has stated:

> When the court has ruled on a point, the same evidence should not again be offered in the presence of the jury . . . there is a duty upon the court to rule decisively. When error creeps into the record, the court should instruct the jury to disregard it. The judge must do more. He must enforce his rulings. Violations of a court's solemn rulings should "lead to serious consequences."

Cody v. Mustang Oil Tool Co., 595 S.W.2d 214, 215 (Tex. Civ. App. 1980). The Washington Supreme Court was even more direct:

> If we are persuaded that a prosecuting attorney or a witness for the state is deliberately trying to deprive the defendant of a fair trial, we will assume that he succeeded in his purpose and grant a new trial. It would seem that our frequent discussions of this subject could, within the near

> future, serve to prevent the reference to a defendant as being on parole by all except the willful or the congenitally ignorant.

State v. Nettleton, 400 P.2d 301, 303 n.4 (Wash. 1965). See also State v. Smith, 65 P.2d 1075 (Wash. 1937) (court reversed conviction because the prosecutor asked a question which at a motion in limine had been ruled improper by trial court).

The case against Mr. Quintana involved the single issue of identification; all parties agreed on that point. The trial court found that the suggestive identification procedure utilized with Mr. Rains violated Mr. Quintana's due process rights and ruled that his identification must be suppressed. The identification was suppressed because its introduction, under the circumstances, would have prejudiced Mr. Quintana. Neither the State nor this Court took issue with the trial court's order suppressing the identification. It becomes difficult to understand how the suppressed identification, when revealed to the jury by the prosecutor during his opening statement, is now cleansed of prejudice to Mr. Quintana. Because of the centrality of the issue of identification to this case and the violation of the trial court's order, much like the right to remain silent violation in State v. Wiswell and the hearsay upon hearsay violation of State v. Brown, the harmless error analysis is inappropriate. Mr. Quintana was prejudiced. His convictions should be reversed.

C. THIS COURT FAILED TO APPLY THE CORRECT LEGAL STANDARD TO THE FACTS OF THE CASE.

This Court opined that because the prosecutor made only

one illicit identification reference to the defendant--and that reference was very early in the two-day trial--that the error somehow becomes benign. Opinion at 5-6. The Court further suggests that compelling evidence otherwise cleansed the prosecutorial misconduct error. Both contentions are erroneous.

In State v. Troy, a case heavily relied on by Mr. Quintana and unaddressed by this Court, the Utah Supreme Court stated the two-prong test for reversing a prosecutorial misconduct case as follows:

> The test of whether the remarks made by counsel are so objectionable as to merit a reversal in a criminal case is, (1) did the remarks call to the attention of jurors matters which they would not be justified in considering in determining their verdict, (2) and were they, under the circumstances of the particular case, probably influenced by those remarks.

688 P.2d at 486 (citing, inter alia, State v. Valdez, 513 P.2d at 426). A discussion of prong one of the test is unnecessary as all parties and even this Court agreed that prong was met. Opinion at 6. In State v. Troy, the Utah Supreme Court offerred additional and very helpful information in analyzing prong two of this two-part test. The Court noted:

> Step two is more difficult [than step one] and involves a consideration of the circumstances of the case as a whole. In making such a consideration, it is appropriate to look at the evidence of defendant's guilt.
>
> If proof of defendant's guilt is strong the challenged conduct or remark will not be presumed prejudicial. Likewise in a case with less compelling proof, this court will more closely scrutinize the conduct. If the conclusion of the jurors is based on their weighing conflicting evidence or evidence susceptible of differing

> interpretations, there is a greater likelihood that they will be improperly influenced through remarks of counsel. Indeed, in such cases, the jurors may be searching for guidance in weighing and interpreting the evidence. They may be especially susceptible to influence, and a small degree of influence may be sufficient to affect the verdict.

Id. at 486 (emphasis added).

Notably, the phrasing of prong two in State v. Troy is somewhat different than that recited by this Court from State v. Thomas. Nonetheless, the substance of prong two is the same. Critically important in the court's explanation of prong two in State v. Troy, however, is that no deference is to be given to the jury's verdict when analyzing a prosecutorial misconduct statement; rather, the more conflicting the evidence and/or the more susceptible the evidence is of differing interpretations, then the greater the likelihood of influence by the remarks or, as phrased in State v. Thomas, the more likely there would be a more favorable result for the defendant.

The analysis under prong two of State v. Troy is distinctively different than that applied to a sufficiency of the evidence challenge. This Court properly deferred to the jury's verdict in responding to the insufficient evidence claim because when conducting that analysis, it is correct to assume the jury resolved the conflicts in the evidence in accordance with the verdict. By examining this Court's treatment of the insufficient evidence claim, the number of conflicts in the evidence in this case and their significance is displayed. This Court repeatedly

addressed the contradicting evidence by indicating that the jurors could have adopted the State's suggested inference or could have believed the State's witness(es) and disbelieved the defense witness(es). Opinion at 7-9.

The Court's resolution of the insufficient evidence claim effectively demonstrates that the evidence against Mr. Quintana was conflicting and susceptible of differing interpretations. Accordingly, the Court should have applied State v. Troy's second prong recognizing that the prosecutor's comments were more than sufficient to influence jurors on how to resolve the conflicts. Because the Court failed to recognize the distinction between a State v. Troy analysis and an insufficiency of evidence claim, it did not correctly scrutinize the prosecutor's conduct. After all, the Troy court expressly noted that "a small degree of influence may be sufficient to affect the verdict." 688 P.2d at 486.

Mr. Quintana avers that the prosecutor's comments were much more than a small degree of improper influence. He believes the error to have been determinative and insists that this court misapprehended the facts of the case to the contrary. Particularly strained in this Court's opinion is the treatment given to the testimony and identification of Mr. Quintana by Mrs. Rains. Mr. Quintana especially challenges the Court's assessment that she supplied the identification evidence buttressed by Mr. Rains' "permissible testimony" that the man in the alley was the same man both of them saw on the porch moments earlier. Opinion at 6.

The Court fails to address that the actual buttressing on

this point comes not from Mr. Rains but from the prosecutor who made the identification of Mr. Quintana as the culprit against the order of the court. Alone, the testimony of Mrs. Rains is uncompelling and questionable support for maintaining the convictions against Mr. Quintana. Even this Court recognized that Patricia Rains was not very articulate in describing the basis for her recognition of Mr. Quintana. Opinion at 7. While her testimony may not have been improbable, a reasonable jury would have required more than the information she provided to convict a man of these crimes beyond a reasonable doubt. They had more, the identification by the prosecutor in defiance of the court order.

Mr. Quintana also complains that the critical information in Mrs. Rains' testimony that she had supplied the name Andy or Andrew Quintana to the police officers during the initial report of the burglary is wholly unreliable. Both police officers who testified where unable to recall a particular first name supplied in any of the reports or broadcasts. That fact alone points out the unlikelihood that jurors would have relied heavily on her testimony. As all other evidence in this case was contradicted, the illicit identification "testimony" by the prosecutor resolved the issue for the jurors in favor of the convictions.

Even assuming the jurors could have believed all of Mrs. Rains' testimony regarding Mr. Quintana, that evidence only placed him on the porch and in the truck. When Mr. Rains testified, the jurors made the connection to Mr. Quintana that was supplied to them during the opening statement by the prosecutor. Accordingly,

under either version of the second prong of State v. Troy or State v. Thomas, Mr. Quintana merits rehearing on this issue, reconsideration of his claims, and reversal of his convictions.

CONCLUSION

For all or any of the foregoing reasons, Appellant, Mr. Andrew Quintana, requests that this Court rehear his case and reverse his convictions.

Respectfully submitted this 25th day of October, 1989.

LYNN R. BROWN
Attorney for Defendant/Appellant

RICHARD G. UDAY
Attorney for Appellant/Petitioner

CERTIFICATION

I, RICHARD G. UDAY, do hereby certify the following:

(1) I am the attorney for the Petitioner in this case;

(2) This Petition for Rehearing is presented to this Court in good faith and not to delay any matter in this case.

Respectfully submitted this 25th day of October, 1989.

RICHARD G. UDAY
Attorney for Appellant/Petitioner

CERTIFICATE OF DELIVERY

I, RICHARD G. UDAY, hereby certify that eight copies of the foregoing will be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 25th day of October, 1989.

RICHARD G. UDAY

DELIVERED by _____ this _____ day of October, 1989.

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ADDENDUM A

IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Respondent, v. Andrew R. Quintana, Defendant and Appellant.	)	OPINION (Not For Publication) Case No. 880406-CA

Third District, Salt Lake County
The Honorable Raymond S. Uno

Attorneys: Lynn R. Brown and Richard G. Uday, Salt Lake City, for Appellant
R. Paul Van Dam and Charlene Barlow, Salt Lake City, for Respondent

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Before Judges Garff, Jackson, and Bullock.[1]

JACKSON, Judge:

Defendant Andrew R. Quintana appeals from the judgment and conviction of burglary and theft entered on a jury verdict. We affirm.

According to the evidence presented at trial, the Ted John family returned to their Salt Lake County home on Emery Street from a two-day trip in the early evening of September 27, 1987. A note on their door informed them that the home had been burglarized and asked them to contact the police. After inventorying their belongings, Ted John reported that a vacuum cleaner worth $100 and stereo equipment worth $800 were missing. The vacuum cleaner was 3-4' high and 14-18" across at the base. The stereo equipment consisted of patch cords and three

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1. J. Robert Bullock, Senior District Judge, sitting by special appointment pursuant to Utah Code Ann. § 78-3-24(1)(j) (1987).

Yamaha components, including an amplifier and cassette player (each measuring 14" wide by 6" tall by 10" deep and weighing 10-15 lbs. and 4 lbs., respectively) and a tuner (measuring 14" by 3" by 10" and weighing 2 lbs.).

At approximately 11:30 the same morning, Patricia Rains, a neighbor who lived across the street from the Johns, was returning from the grocery store. As she turned onto her street, she noticed a burgundy Mazda pickup truck parked on the street and a man in a tank top and colorful Bermuda shorts looking at her from the porch of the Johns' home, approximately 30' away. In the course of unloading her groceries from her car, she saw the individual knock on the Johns' front door, wait for an answer, look in the picture window, and open the mailbox lid. Once inside her apartment, she continued to watch the man through her front bay window, approximately 85-100' from the Johns' front porch, along with her husband, Calvin Dean Rains. She saw the man walk off the porch and over to the burgundy truck.

Calvin Dean Rains testified that, while looking out his apartment window for his wife on the morning of September 27, 1987, he saw a man in a late-model, dark maroon Mazda or Nissan pickup truck, with lowered suspension and a broken front grille on the driver's side, park down the street from the Johns' home and walk up their driveway. The man was Spanish or Mexican, approximately 5'6" or 5'7" tall, in his mid-20's, with black semi-wavy hair. He wore multicolor Bermuda shorts and a baggy T-shirt with sleeves and an emblem on one side. The man went onto the porch, looked in the window, looked in the mailbox, opened the screen door, and tried the knob on the front door. He then returned to the truck and backed it down the street and around the corner out of sight.

A few minutes later, Calvin Dean Rains went to his truck to return to the grocery store for some forgotten items. He pulled around the corner and spotted the same maroon pickup truck parked across from the alley that ran behind the Johns' home. Suspicious, he did a U-turn and stopped his own truck near the alleyway and waited a few minutes. From 75 or 80 yards away, he saw the man who had been on the front porch come out of the alleyway. When the man saw Rains, he immediately turned around and began walking in the opposite direction. After taking several steps, the man again turned around completely and walked directly to the burgundy Mazda. He looked like he was carrying something under his shirt because he had a large bulge under the left side of his baggy shirt that was supported by his arm. The man got into the pickup and, after a few moments, drove away past Rains.

Rains returned to his home and told his wife that someone had been robbed. They then went with another neighbor to the back of the Johns' home, where they found an open window and door and a screen on the grass. The tall weeds near the four foot high picket fence that separates the Johns' property from the alleyway had been trampled down, making it appear that someone had walked through them and climbed over the fence. They returned to their home and Patricia Rains called the police, providing a description of the man and the truck, the name Andy Quintana, and the license number 5600AK, which Calvin Rains had remembered and written down on a piece of paper.

A police dispatch was sent out at about noon concerning a burglary at the John residence. The suspect was described as a male Hispanic with dark hair, approximately 5'7" and 130 lbs. The vehicle was described as a maroon Mazda pickup, license number 5600AK, with chrome trim and damage to the grille area. The officer who responded to the dispatch did not recall being given the name of the man seen at the Johns' residence.

When Officer Robert Robinson came on duty that afternoon, his supervisor told him of the burglary and gave him the vehicle description, the probable license plate number, and a description of the suspect as a short, male Hispanic in his twenties, wearing a shirt and shorts. He was also told that the suspect vehicle belonged to "the Quintanas," but he did not recall being given a first name. At 3:00 that afternoon, Officer Robinson stopped a truck fitting the description, but with license number 3600AK. The driver, who identified himself as Andrew R. Quintana, was wearing a blue pullover shirt and grey Bermuda shorts. Robinson checked the registration of the pickup and found that it was registered in the name of Jack N. Quintana, defendant's brother. The officer stated the reason for the stop. Defendant explained that he and the truck had been at his home all morning, a few blocks from where he was stopped, until he went to his sister's on Shannon Circle at about 2:00 p.m. to help move a washing machine. As the officer continued his questioning, defendant altered his story somewhat. When Robinson asked him if the pickup had been on Emery Street, defendant said that he had a sister, Irene, who lived on that street, but denied being there that day. Then he mentioned that he had helped a sister in the morning. By the end of the conversation with Officer Robinson, however, defendant had reverted to claiming he was at his own home all morning and had helped his sister on Shannon Circle in the afternoon. Robinson decided to impound the pickup and the patch cords he saw on the passenger's seat of the pickup, and defendant left on foot.

Defendant's sister, Gerline, testified that defendant had come to her home on Shannon Circle on either Saturday, September 27, or Sunday, September 28, at about 1:45 p.m. to help move her washer and dryer. He was wearing grey shorts and a T-shirt. He was alone in the the maroon Mazda pickup, which she described as riding low to the ground. Defendant's mother testified that defendant lives with her and that she washes his clothing. She stated that defendant did not have any Bermuda shorts with multiple colors or any shorts that came down to his knees and no bulky tank tops or T-shirts with emblems or writing on them. When she and her husband left their home on September 27 at 10:15 a.m., defendant was asleep; he was, as far as she knew, also asleep when they returned at about 11:45 a.m. She also verified that defendant has a sister, Irene, who lives around the corner from the Johns' residence, but on Illinois Avenue, not Emery Street.

Jack Quintana testified that he owned the maroon and chrome Mazda pickup, which rides low in the back and is missing a front grille, in which defendant was stopped. He identified the patch cords introduced by the State as his own, explaining that he uses them to connect a portable amplifier, which was introduced at trial, to his cassette player in the truck and to his stereo in his home. He had last seen the patch cords at the bottom of the truck seat on September 11, 1987, the day he was incarcerated as a result of a theft conviction that month. Finally, an investigator testified that the defendant is 5'4-3/4" tall in sneakers.

I.

At trial, Patricia Rains identified the man she saw on the Johns' porch as the defendant, asserting that she recognized him as Andy Quintana as soon as she saw him there and that she recognized the truck he was driving. She stated that she provided the police with his name when she called them. When asked on cross-examination how she knew defendant, she said that she had never met him, but knew of him, and asserted that he might have been to her home with her little sister, although she was not sure. In response to defense counsel's question about when the last time was that she had seen him prior to seeing him at the Johns' residence, she confusingly responded, "Two or three days ago." When pressed on redirect to explain how she put the name Andy Quintana on the face she saw on September 27, she stated that she was familiar with the face because she had seen him around. She suggested that he had been pointed out to her on the street and named by her sisters. She claimed that she had seen him several times before September 27.

During the investigation of the John burglary, Calvin Dean Rains was called to the police station to see if he could identify a suspect in the crime. Defendant was brought into a room by a police officer and walked past the desk at which Rains was sitting. Rains identified defendant as the man he had seen at the Johns residence on September 27. Because of the highly suggestive nature of this identification process, the trial court granted defendant's pretrial motion to suppress and issued an order prohibiting the State from using the testimony of Calvin Dean Rains to identify Andrew Quintana.

During the course of his opening statement to the jury, the prosecutor, Ernest Jones, told the jury of the Rainses' observations of a man on the Johns' porch and that Patricia Rains had told the police that she knew who the man was, i.e., the defendant Andrew Quintana. The prosecutor then stated, "Well, Mr. and Mrs. Rains watched the defendant" and went on to decribe the man's movements on the porch and Mr. Rains's subsequent actions in getting into his own truck and eventually parking by the alleyway after seeing the maroon Mazda parked there. The prosecutor continued: "And he said that the defendant was out of sight. He didn't know exactly where the defendant had gone, but essentially he said he saw him come out."

Defense counsel objected at this point, and a conference was held at the bench. When Jones continued his opening statement, he referred to the person seen by Rains coming out of the alleyway as "the man," not as "the defendant." At the close of the prosecutor's opening remarks, the jury was excused and defendant moved for a mistrial, asserting that the State had just accomplished an identification of the defendant by Mr. Rains through the prosecutor's statement that it was prohibited by court order from introducing through Mr. Rains's direct testimony.

On appeal, Quintana contends that the prosecutor's remarks during opening statement constituted misconduct requiring reversal of his conviction and remand for a new trial. The Utah Supreme Court has recently reiterated that a prosecutor's actions or remarks constitute misconduct meriting reversal if

> (1) the actions or remarks call to the attention of the jurors matters they would not be justified in considering in determining their verdict and (2) under the circumstances of the particular case, the error is substantial and prejudicial such that there is a reasonable likelihood that in its absence there would have been a more favorable result for the defendant.

State v. Thomas, 111 Utah Adv. Rep. 24, 25 (1989); accord State v. Tillman, 750 P.2d 546, 555 (Utah 1987).[2]

There is no question that the prosecutor's statements concerning Mr. Rains's observations of defendant, quoted above, were highly improper in light of the court's pretrial order prohibiting the State from using any identification testimony by Mr. Rains. Thus, the first part of the test set forth in State v. Thomas is satisfied. However, although we do not condone the prosecutor's misconduct in this case, we conclude that his remarks did not substantially prejudice defendant under the circumstances.

The improper remarks to the jury occurred in the first few minutes of this two-day trial. The prosecutor began his opening statement by telling the jury that the comments of attorneys during opening statements are not evidence. When he reached the point of describing how the Rainses watched a man on the Johns' front porch, he said that Patricia Rains told the police she knew the man was Andrew Quintana. The prosecutor then made the improper, but isolated, remarks about Mr. Rains seeing the defendant. After defendant's objection and the conference at the bench, the prosecutor restricted his references to "the man" in describing what Calvin Dean Rains saw and said. When defense counsel proceeded with his own opening statement, he again cautioned the jury that what the attorneys say is not evidence. During his subsequent testimony, Calvin Dean Rains described only what he observed and made no attempt to testify that the man he saw at the Johns' residence was, in fact, defendant. He did give permissible testimony that the man he saw on the front porch of the Johns' home was the same man he saw come out of the alleyway behind their home several minutes later with a large bulge under his baggy shirt. It was Patricia Rains who identified defendant for the jury as the man she saw on the Johns' porch and who testified that she recognized him on the day of the burglary because his face was familiar to her.

Although these surrounding circumstances and all the evidence presented at trial do not excuse the prosecutor's misconduct, they convince us that his remarks did not taint the

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2. Defendant does not contend that the prosecutor's remarks resulted in error amounting to a violation of his federal constitutional rights. Such errors require reversal unless they are harmless beyond a reasonable doubt. State v. Tuttle, 106 Utah Adv. Rep. 6, 12 (1989).

proceedings to the extent that, if they had not occurred, there is any reasonable likelihood that the jury would have decided the case differently. See State v. Mitchell, 116 Utah Adv. Rep. 3, 6 (1989).

II.

Quintana next challenges the sufficiency of the evidence to support his conviction for the burglary and theft at the Johns' residence. Specifically, he contends that there is insufficient evidence to identify him as the person who committed the crimes or to connect him with any of the property stolen from the Johns.

In considering such a claim, we view the evidence presented and all inferences that can be drawn therefrom in the light most favorable to the jury's verdict. State v. Gardner, 101 Utah Adv. Rep. 3, 10 (1989). This court will reverse a jury conviction only when the evidence, viewed in this light, "'is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted.'" State v. Cobb, 774 P.2d 1123, 1128 (Utah 1989) (quoting State v. Marcum, 750 P.2d 599, 601 (Utah 1988)).

We reject Quintana's attack on Patricia Rains's identification of him as "inherently unreliable." She saw the man on the Johns' porch from only 30' away as she turned into her driveway, and she watched his actions from her driveway for several minutes. It is insignificant that Patricia Rains described the man as being just over an inch taller than defendant is in sneakers. It is equally uncompelling that, although she described the man as wearing bright, multicolored Bermuda shorts, defendant was stopped three hours later wearing grey shorts. He had ample opportunity and reason to change clothes in the interim. The jury did not have to believe his mother's testimony that he does not own the type of shorts described by the Rainses.

In addition to Patricia Rains's in-court identification, the jury could also consider her testimony that she recognized the man on the porch as Andy Quintana as soon as she saw him there. She made it clear that she had seen him several times in her neighborhood before September 27, 1987, and that defendant had been pointed out to her and named by one of her sisters. The likelihood of such an occurrence was highlighted by the testimony of defendant's mother that one of his sisters lived very near the Rainses. Although Patricia Rains was not very articulate in describing the basis for her recogition of defendant that day, her testimony was neither inconclusive nor improbable.

There is also sufficient evidence in the record from which the jury could find that defendant obtained or exercised unauthorized control over the Johns' property. A vacuum cleaner, three stereo components, and patch cords were missing. The three components, if stacked, measured 14" wide by 10" deep by 15" tall and weighed, at most, 21 lbs. The witnesses testified about the physical condition of the home and yard, from which it could be inferred that someone had broken into the house through the rear window, taken the Johns' property, left through the back door, walked through the weeds, and vaulted the picket fence, described by Ted John as being as tall or a little shorter than the courtroom railing.[3] The man whom Calvin Dean Rains had initially seen on the front porch, identified as defendant by Rains's wife, emerged from the alley behind the Johns' home a short time later with a large bulge under his shirt that could have been the stereo equipment. He acted suspiciously by changing directions after seeing Rains watching him and then promptly changing directions again.

Defendant was later stopped in a truck substantially matching the Rainses' description, including all but one number in the license plate, with patch cords on the front seat. Ted John described these cords as similar to his own, although he could not positively identify them as his. Even without such a positive identification of the patch cords by Ted John, and even if the jury found that the patch cords introduced at trial belonged to defendant's brother, there was ample evidence from which the jury could find all the elements of theft as set forth in Utah Code Ann. § 76-6-404 (1978).

Quintana's other two issues on appeal involve Jury Instruction 19, given over defendant's timely objections:

> Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which

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3. Ted John also described a gate in the fence, but the location of that gate in relation to the Johns' fence or the alley is unclear. The diagram to which he referred during his testimony, although introduced by the State at trial, is not in the record on appeal.

> you may reasonably draw the inference and find, in light of the surrounding circumstances shown by the evidence of the case, that the person in possession knew the property had been stolen.
>
> Thus if you find from the evidence and beyond a reasonable doubt, that the defendant was in possession of stolen property, that such possession was not too remote in point of time from the theft, and the defendant made no satisfactory explanation of such possession, then you may infer from those facts that the defendant committed the theft.
>
> You may use the same inference, if you find it justified by the evidence, to connect the possessor of recently stolen property with the offense of burglary.

Quintana contends that the trial court erred by giving this instruction because there is no factual basis in the record to support it. See State v. Howland, 761 P.2d 579, 580 (Utah Ct. App. 1988). He bases this argument on Ted John's failure to testify that the patch cords taken from the impounded truck were his patch cords. We believe there is adequate evidence in the record to support this instruction. In light of Ted John's identification of the cords as similar to his and the other testimony regarding the identification of defendant and his truck at the Johns' residence a few hours before he was stopped, there was evidence from which the jury could have concluded that the patch cords seized were, in fact, those stolen from the Johns. The jury was free to disbelieve Jack Quintana's testimony that the patch cords in evidence were his.

Finally, defendant asserts that Instruction 19 violated his state and federal constitutional rights to due process because it created an irrebuttable presumption relieving the State of its burden of proving him guilty beyond a reasonable doubt. We conclude that this issue is completely meritless. Instruction 19 does not use the "prima facie evidence" language in Utah Code Ann. § 76-6-402(1) (1978), which was held to create an unconstitutional irrebuttable presumption in State v. Chambers, 709 P.2d 321, 326 (Utah 1985). The first paragraph of Instruction 19 does not create an irrebuttable presumption that the person who is inexplicably in possession of stolen property stole that property. Like the instruction held not to be

constitutionally defective in State v. Johnson, 745 P.2d 452 (Utah 1987), Instruction 19 simply allowed the jury to infer, if it found that the defendant was in possession of stolen property without satisfactory explanation, that he stole such property. Such an inference is not constitutionally impermissible. Id. at 456; State v. Graves, 717 P.2d 717 (Utah 1986).

Affirmed.

Norman H. Jackson, Judge

WE CONCUR:

Regnal W. Garff, Judge

J. Robert Bullock, Judge